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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-1667

JOHN R. MANSON,

Petitioner

v.

MAXIMINO VILLAFANE,

Respondent

MOTION FOR LEAVE TO
PROCEED IN FORMA PAUPERIS

The respondent, Maximino Villafane, asks leave to proceed in forma pauperis pursuant to Rule 46, United States Supreme Court Rules. Respondent was previously granted leave to proceed in forma pauperis by the United States District Court, District of Connecticut on March 7, 1978.

Respectfully Submitted,

Respondent

BY: Martha Stone

Martha Stone
Connecticut Civil Liberties
Union Foundation
57 Pratt Street
Hartford, Connecticut 06103

Attorney for Respondent

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Motion for Leave to Proceed in Forma Pauperis has been mailed, postage prepaid, to Robert E. Beach, Jr., Assistant State's Attorney, 100 South Turnpike Road, Wallingford, CT, 06492 this 29 day of April, 1981.

Martha Stone

Martha Stone

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OCTOBER TERM, 1980

JOHN R. MANSON, Commissioner of Correction
of the State of Connecticut,

Petitioner

v.

MAXIMINO VILLAFANE,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

MARTHA STONE
Connecticut Civil Liberties
Union Foundation
57 Pratt Street
Hartford, CT 06103

Attorney for Respondent

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QUESTIONS PRESENTED FOR REVIEW

A. Was Respondent entitled to the relief granted when the grand jury which indicted him was unconstitutionally racially biased, even though the procedure has been subsequently altered by the sheriff in Fairfield County?

B. Did the lower courts err in concluding, based upon statistical proof and testimonial evidence, that a constitutionally suspect selection procedure was responsible for Respondent's indictment?

STATEMENT OF THE CASE

Respondent Maximino Villafane was indicted in 1971 for felony murder by a grand jury selected by Sheriff John P. Previdi, in his unfettered discretion, from a relatively static card file of 138 persons made up "largely of friends and acquaintances personally known to the sheriff, including some who were golfing partners of his, and friends and acquaintances of the sheriff's friends." (Petitioner's Appendix 9A, 13A, 14A, hereinafter referred to as Pet. App.) On federal habeas corpus challenging his subsequent conviction, the United States District Court in Connecticut concluded that the grand jury selection method used to indict Respondent was the product of an unconstitutionally racially biased selection procedure. (Pet. App. 27A-47A)[1] The United States Court of Appeals unanimously affirmed this decision and the petition for rehearing in banc filed by Petitioner was denied, with not a single judge requesting a vote be taken on the petition. (Pet. App. 2A)

The conclusion of the District Court was soundly based upon both the statistical as well as testimonial evidence. Out of 738 selections made by the sheriff from this list during the years between 1963 and 1971, persons of Puerto Rican extraction were chosen only twice. (Pet. App. 28A) Thus, 39 out of 41 panels contained no Puerto Ricans. In the year 1971, during which Respondent's grand jury was selected, none of the 180 grand jurors chosen was Puerto Rican. A fortiorari, Respondent, who is Puerto Rican, had no Puerto Rican jurors on his grand jury. Statistical analysis of this data through use of statistical decision theory yielded the conclusion that significant underrepresentation of Puerto Ricans on Fairfield County grand juries had occurred over a

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1 This case is now reported. Villafane v. Manson, 504 F.Supp. 78 (D. Conn. 1980).

significant period of time which could not be attributed to chance.

Furthermore, the testimony of the sheriff himself buttressed the evidence of racial bias. The sheriff admitted he did not personally know any Puerto Ricans (Pet. App. 28A) and that he made no efforts to insure that Puerto Ricans would have the opportunity to serve as grand jurors in Fairfield County in Connecticut despite the fact they represented a small but cognizable class in the county. (Pet. App. 30A) Although one Puerto Rican was added to his list in 1966 at the suggestion of a friend, and another added in 1970, once these two persons refused to serve or could not be located, their names were never removed from his list (Pet. App. 14A, 15A) or replaced by other Puerto Ricans willing to serve. This was contrary to the sheriff's usual practice of making changes in his list when others died, moved from the county or made themselves permanently unavailable. (Pet. App. 14A, 15A) Moreover, the sheriff never changed his method of selection in spite of the fact that between 1966 and 1971, Spanish-surnamed electors residing in his county almost doubled. (Respondent's Appendix 1) For purposes of making his selections, he never consulted voting lists nor made attempts to ascertain the neighborhoods in which Puerto Ricans were concentrated. (Pet. App. 28A) The sheriff admitted that his selection of grand jurors from grand jury panels was not color-blind, conceding that he made it his practice intentionally to select a person for grand jury service of the same ethnic or racial background as that of a defendant, where he knew the defendant's ethnic or racial background. (Pet. App. 38A)

ARGUMENT

I. HABEAS CORPUS RELIEF WAS PROPERLY AFFORDED THE RESPONDENT WHO HAD BEEN INDICTED BY AN UNCONSTITUTIONALLY RACIALLY BIASED GRAND JURY.

Petitioner urges that this judgment should be reviewed principally to determine whether an indictment handed down by an

unconstitutionally selected grand jury should be deemed harmless error if, "between the times of the indictment and the federal [habeas corpus] action," the grand jury selection procedure has been "changed". (Pet. Brief 7-8) In other words, Petitioner seeks to argue that a federal district court in such cases should not only examine the constitutionality of the selection procedure used for the grand jury involved in the case before it, but also examine some or all of the selection procedures subsequently used in the jurisdiction to determine whether those subsequent procedures are constitutional.[2]

This argument does not present a question of sufficient general importance to warrant review by this Court. Since the decision of Rose v. Mitchell, 443 U.S. 545 (1979), there have been only four reported cases in the federal courts - including Mitchell itself on remand and the instant case - that could even arguably be affected by the rule sought by Petitioner.[3] Not surprisingly,

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[2] The precise rule which Petitioner urges for adoption is not entirely clear. The argument appears to be that the indictment should be upheld if the grand jury selection procedure is constitutional on the date the habeas corpus petition is filed (see Pet. Brief 7), but it could be that Petitioner is arguing that the indictment should be upheld if the selection procedure has ever been "reformed", whether or not that reformation persists to the date of the habeas petition, or subsequently through the appellate process.

[3] To date, there are 18 reported cases in the federal court system (7 in the District Courts and 11 in the Circuits) citing Rose v. Mitchell. Seven involve wholly unrelated questions: Palmigiano v. House, 618 F.2d 877 (1st Cir. 1980) (search and seizure); Phillips v. Smith, 632 F.2d 1019 (2d Cir. 1980) (petit juror applied for police work); McFarland v. Smith, 611 F.2d 414 (2d Cir. 1979) (prosecutor's summation); Potts v. Zant, 638 F.2d 727 (5th Cir. 1981) (abuse of writ); Green v. White, 605 F.2d 378 (8th Cir. 1979) (religious discrimination in prison); Dunn v. Rose, 504 F.Supp. 1333 (M.D. Tenn. 1981) (search and seizure, double jeopardy, effective counsel); Berg v. Morris, 483 F.Supp. 179 (E. D. Cal. 1980) (trial judge's conduct). Four involve prejudgment motions to dismiss the indictment, or direct appeal of such motions. United States v. Maskeny, 609 F.2d 183 (5th Cir. 1980), cert. den. 100 S.Ct. 3010, reh. den. 101 S.Ct. 27; United States v. Sanchez, ___F.Supp.___(D. Mass. Jan. 16, 1981) (reported by LEXIS); United States v. Marcano, ___F.Supp.___(D.P.R. Nov. 7, 1980)(reported by LEXIS); United States v. Jenison, 485 F.Supp. 655 (S.D. Fla. 1979).

(continued next page)

there is no conflict in the Circuits on this question, a fact which, significantly, Petitioner does not contend to the contrary. (Pet. Brief 7-8)

Nowhere in Rose did this Court qualify its holding to apply only to cases where the selection process challenged remains unchanged prior to and after the challenge is initiated. This Court specifically held that "because discrimination on the basis of race in the selection of members of a grand jury thus strikes at the fundamental values of our judicial system and our society as a whole, no inquiry need even be undertaken into the prejudice incurred by a defendant." 443 U.S. at 556.[4] Since Respondent demonstrated that his indictment is procured from an unconstitutional procedure, he was entitled to a reversal of his conviction and a retrial in order to cure the abhorrent constitutional

Footnote 3 continued

One case was a civil action for injunctive relief and declaratory judgment challenging existing grand jury procedures. Ciudadanos Unidos of San Juan v. Hidalgo County Grand Jury Commission, 622 F.2d 807 (5th Cir. 1980) cert. den., 49 U.S.L.W. 3643. One was a petition for pretrial removal to a federal court. Williams v. Mississippi, 608 F.2d 1021 (5th Cir. 1980). And in one, the Court of Appeals found no unconstitutional discrimination. Guice v. Fortenberry, 633 F.2d 699 (5th Cir. 1980).

Thus, in only four reported cases in almost two years is there even the potential for any application of the rule for which Petitioner contends. Those cases are Mitchell v. Rose, 605 F.2d 557 (6th Cir. 1979) (on remand from this Court); U.S. ex rel. Barksdale v. Blackburn, 49 U.S.L.W. 2911 (5th Cir. March 16, 1981) (in banc), superseding 610 F.2d 253 (5th Cir. 1980); Hillery v. Sumner, 496 F.Supp. 632 (E.D. Cal. 1980); and the instant case, Villafane v. Manson, 504 F.Supp. 78 (D. Conn. 1980).

4 Not only does Petitioner ignore this principle by arguing that Respondent suffered no prejudice (Pet. Brief 7) but he also attempts to suggest that the fact that Respondent has no right to a particular cross-section on his "own grand jury" entitles him to reversal of the lower court's decisions. (Pet. Brief 7) A criminal defendant is entitled, however, "to require that the state not deliberately and systematically deny to members of his race the right to participate as jurors in the administration of justice,[8]" Alexander v. Louisiana, 405 U.S. 625, 628-29 (1972) (footnote omitted), even if in fact he has no absolute right to a cross-section on his own grand jury. Respondent was clearly deprived of this right. (Pet. App. 38A)

deficiency perpertrated upon him. See Rose, 443 U.S. at 559; Hill v. Texas, 316 U.S. 400, 406 (1942); Berg v. Morris, 483 F.Supp. 179, 187 (E.D. Cal. 1980); Villafane v. Manson, Pet. App. 40A.

Finally, even if the question raised by Petitioner was of substantial importance, the instant case does not present an appropriate forum in which this Court could squarely address the issue. The statutes involving selection of grand juries in Connecticut have not been changed in any relevant way since Respondent was indicted.[5] The only evidence of "change" in the unconstitutional procedure used in this case is that the person who presently fills the position of a deputy sheriff of Fairfield County has filed an affidavit claiming he now chooses grand jurors randomly. (Pet. App. 46A-47A n.18) This change is not codified but remains as unwritten internal policy. (Pet. App. 47A n.18) Thus, the sheriff is still vested with unbridled discretion in the selection of grand jurors, which discretion he has for the moment chosen to limit. No state statute, body of administrative law or other legal barrier constrains him from reverting back to his prior unconstitutional practice, and indeed, the constitutionally suspect selection process at play in Respondent's case is still

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[5] At the time Villafane raised this issue in the state court system, the Connecticut statutes allowed for any elector residing within the county where the Superior Court is sitting to be eligible for grand jury service for that county. Ct. General Statutes §54-45. The only modification occurred in 1978 when the Connecticut legislature substituted the words "judicial district" for "county." Connecticut Public Act 78-180. Although in Connecticut petit jurors are chosen pursuant to an elaborate scheme outlined in Connecticut General Statutes §51-221 at random from elector lists, and although the statute does not distinguish grand jury selection procedures from petit jury selection procedures, the latter continue to be made by the county sheriff at whim, subjecting the state to repeated equal protection challenges to grand jury arrays. See State v. Cobbs, 164 Conn. 402, 324 A.2d 234 (1973); Cobbs v. Robinson, 528 F.2d 1331, cert. den., 424 U.S. 947 (1975); State v. Jerry K. Glenn, Superior Court, Judicial District of New London/Norwich, No. 11866, Defendant's Motion to Challenge the Array, filed March 19, 1979; State v. Castonguay, No. 42509, Defendant's Motion to Quash Indictment by Reason of Challenge to Grand Jury, filed November 27, 1979; State v. Couture, Cr. No. 4-71979, Superior Court, Judicial District of Waterbury, Defendant's Motion to Dismiss Indictment (pending).

employed in other major Connecticut judicial districts, forcing the District Court to specifically conclude that "Connecticut, as the prosecutor, may still benefit from the reminder that racially biased selections for grand juries cannot be tolerated." (Pet. App. 47A n.18) Under these circumstances, even the harmful error rationale which Petitioner claims underlies Rose compels issuance of the writ of habeas corpus here and denial of certiorari.

II. THE COURTS BELOW CORRECTLY CONCLUDED, BASED ON STATISTICAL AND/OR TESTIMONIAL EVIDENCE, THAT A CONSTITUTIONALLY SUSPECT SELECTION PROCEDURE WAS RESPONSIBLE FOR RESPONDENT'S INDICTMENT.

The remaining questions argued by Petitioner are nothing more than attacks on the two lower courts' findings that the grand jury which indicted respondent was unconstitutionally selected. It is important to emphasize that this case does not involve federal court review of an ordered, racially neutral selection procedure, such as random selection from voter registration or other lists. It involves federal review of grand juries selected at whim by a sheriff from a list composed primarily of his friends and acquaintances. Inevitably in such cases, drawing or rejecting an inference of discriminatory purpose in the selection process will be difficult. Courts in such cases will have to struggle through voluminous evidence and exercise judgment on the appropriate inferences to be drawn from that evidence. The result in any one case, involving as it must the question of the state of mind of the particular individual making the selection, will be of limited value to other courts seeking to probe the recesses of other minds.

In the case at hand, the percentage of Puerto Ricans in Fairfield County during the relevant period, although small, was six times the percentage of Puerto Ricans serving on Fairfield

County grand juries.[6] The District Court and one of the Circuit Court judges relied upon statistical analysis, specifically use of statistical decision theory (SDT), in order to reach the conclusion that Respondent had demonstrated an unconstitutionally biased grand jury selection method. Petitioner does not quarrel with the statistical computations but urges certiorari to advance the proposition that application of SDT is somehow inappropriate. (Pet. Br. 8)

Whether one statistical approach for a given set of facts is more appropriate than another is certainly not a substantial federal question which warrants this Court's attention. Statistical decision theory has already been acknowledged by this Court as a useful mathematical model on at least four occasions[7] and has been consistently applied in discrimination cases by federal courts throughout the country.[8] It was approved by the Connecticut Supreme

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[6] Pet. App. 36A. If one takes as the relevant proportions the percentage of Puerto Ricans on the voter registration rolls, as presented by Petitioner in his statement of the Questions Presented (Question B), the percentage was still three times as great as the percentage of Puerto Ricans on grand juries.

[7] See Whitus v. Georgia, 385 U.S. 545, 552 n.2 (1967); Alexander v. Louisiana, 405 U.S. 625, 630 n.9 (1972); Castaneda v. Partida, 430 U.S. 482, 496 n.17; Hazelwood School District v. United States, 433 U.S. 299, 208-9, 311 n.14, 17 (1977).

[8] See Board of Education of City School District of New York v. Califano, 584 F.2d 576, 584 n.29 (2d Cir. 1978), aff'd 100 S.Ct. 363 (1979); Caulfield v. Board of Education of City of New York, 486 F.Supp. 862, 902 (E.D.N.Y. 1979); Guardians Assoc. of New York City Police Dept. v. Civil Service Comm. of New York, 484 F.Supp. 785, 793 (S.D.N.Y. 1980); Cooper v. University of Texas at Dallas, 482 F.Supp. 187, 194 (N.D. Tex. 1979).

Court when originally reviewing this issue as the most "appropriate" method for these facts and found by the District Court as a "far more accurate measure of intent." (Pet. App. 35A)[9]

Even if the issue raised by Petitioner in this regard deserved consideration, this case is particularly inappropriate for review because, as two of the Circuit Court judges impliedly recognized, the factual posture of the case presents a wholly independent ground for judicial affirmance of the District Court's order apart from analysis of the statistical data. The sheriff's own testimony as to his method of selection, as presented by Respondent to the District Court and undisputed by Petitioner, constituted blatant evidence of his "intent to discriminate." This is particularly true since not only did he fail to take steps to correct the racial imbalance of his list but he admitted he intentionally matched a Puerto Rican grand juror with a Puerto Rican defendant. This Court

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[9] It was a particularly appropriate method in this particular case for three reasons. First, it allowed the Court to assess the significance of a given disparity between the proportion of a group's membership in grand juries and its proportion in the total population not only intuitively but with the aid of a statistical probability theory. It predicts for the Court the likelihood that an event at least this extreme or this unlikely would result from chance. While the other methods fail to furnish any probalistic level from which a Court could draw conclusions about the numerical calculations, SDT quantified the likelihood of the discrepancy occurring, thus offering a reliable criterion by which to interpret the significance of the differentials. See Davis v. City of Dallas, 487 F.Supp. 389, 393 n.8 (N.D. Tex. 1980). Secondly, SDT took into account the size of the sample (here the sample of 738 selections). Because sample size figures directly in the statistical calculations, and because the larger the sample the more confidence one has in the data, it is clear that this method will result in more valid conclusions. Lastly and perhaps most importantly, SDT was especially effective since the putatively excluded group comprises only a small proportion of the total population. When the underrepresented class constitutes a small percentage of the population, a small percentage differential between its proportion in the total population and its proportion among grand jury selections may be more meaningful than a far larger percentage differential in a case in which the underrepresented class constitutes a larger percentage of the population; again, SDT furnishes the statistical tool to assist the Court in making this determination. See Ross v. Wyrick, 581 F.2d 172, 174 n.6 (8th Cir. 1978).

on several occasions has warned that "inclusion" is just as unconstitutional as "exclusion." Casell v. Texas, 339 U.S. 282, 287 (1950); Smith v. Texas, 311 U.S. 128, 132 (1940); Avery v. Georgia, 345 U.S. 559 (1953).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari be denied.

THE RESPONDENT
MAXIMINO VILLAFANE

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing has been mailed, postage prepaid, to Robert E. Beach, Jr., Assistant State's Attorney, P.O. Box 5000, Wallingford, CT, 06492 this 29 day of April, 1981.

Martha Stone
Martha Stone

APPENDIX TO RESPONDENT'S BRIEF

The following represents Correction of Finding issued by the Connecticut Superior Court which supplements those Findings of Fact contained in Petitioner's Appendix 9A-27A.

STATE *vs.* VILLAFANE

Correction of Finding

Treating the State's Motion to Correct Finding dated September 7, 1972, as the assignment of errors required under Sec. 622 of the Practice Book, the following corrections of the Finding are made by adding to the First Section thereof these paragraphs:

118 a. The 10 grand juries selected during the year 1970 were composed of 80 different individuals out of a total of 180 selected for service. Of said 80 individuals, 52 served on anywhere from 2 to 5 grand juries. 28 served on one grand jury only.

118 b. The 10 grand juries selected during the year 1971 were composed of 86 different individuals out of a total of 180 selected for service. Of said 86 individuals, 57 served on anywhere from 2 to 5 grand juries. 29 served on one grand jury only.

118 c. The 5059 electors with Spanish-sounding surnames reported for the seven towns indicated on Exhibit 2 constituted approximately 1.35 per cent of the total of 373,575 electors in the 23 towns of Fairfield County for the year 1971.

118 d. The 4058 electors with Spanish-sounding surnames reported for the seven towns indicated on Exhibit 2 constituted approximately 1.11 per cent of the total of 365,199 electors in the 23 towns of Fairfield County for the year 1970.

118 e. There were 3278 electors with Spanish-sounding surnames reported for the seven towns indicated on Exhibit 2 in 1969 out of a total of 367,492 electors for 23 towns in Fairfield County for the year 1969.

118 f. There were 2621 electors with Spanish-sounding surnames reported for the seven towns indicated on Exhibit 2 in 1966 out of a total of 344,528 electors in the 23 towns of Fairfield County.

118 g. There were 1784 electors with Spanish-sounding surnames reported for the four towns indicated on Exhibit 2 in 1963 out of a total of 326,773 electors in the 23 towns of Fairfield County.

118 h. Although the number of Spanish-surnamed electors in just the seven towns indicated on Exhibit 2 almost doubled between 1966 and 1971, the method of selection of grand jurors did not change from what it had been in 1966 and from the years preceding 1966.

Except for the foregoing corrections, further corrections of the Finding are refused.

SADEN,
Judge.

Filed Sept. 12, 1972.